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82-891

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PHOENIX UNION HIGH SCHOOL DISTRICT; PATRICK HENDERSON; MARY K. CARR; V. A. DUNHAM, JR.; GEORGIE GOODE; DON KENNEDY and MARY PRICE,
Defendants-Appellants.

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

The primary question presented by this appeal is whether Arizona Revised Statutes Annotated § 38-431.03 (B) is preempted by federal law. A.R.S. § 38-431.03 (1974, Supp. 1981). Section 38-431.03(B) provided that minutes of executive sessions of meetings of public bodies were to be kept confidential except from members of the public body which met in executive session. The United States Court of Appeals for the Ninth Circuit, in affirming the District Court's Summary Judgment in favor of the Government, held that this Arizona statute is preempted to the extent that it frustrates the government's congressionally mandated duty to investigate whether public programs receiving federal funds are complying with Title VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000(d). Federal regulations enacted pursuant to Title VI permit access to information that may be pertinent to ascertain compliance. 34 C.F.R. § 100.6(c). Appellants contend that the Arizona statute prohibits disclosure of the executive minutes to federal investigators. The Court of Appeals held that the state statute is preempted, and that the minutes should be provided to Appellee so that it may conduct its compliance investigation.

Related to the primary question presented herein is whether it is appropriate to apply a balancing test when determining if A.R.S. § 38-431.03 prohibits disclosure of executive session minutes in a Title VI compliance review. The Court of Appeals for the Ninth Circuit held that the granting or withholding of any privilege requires a balancing of competing policies. Appellants contend that an amendment to A.R.S. § 38-431.03, effective after the decision of the Court of Appeals was rendered, reveals the intent of the Arizona Legislature to grant an absolute privilege regarding minutes of executive sessions under the present circumstances.

Also related to the primary question is whether a regulation promulgated pursuant to a federal statute applying only to programs receiving federal funds can preempt a state statute which applies to public bodies regardless of whether or not they receive federal funds. Title VI and the regulations promulgated thereunder apply only to programs receiving federal funds. Phoenix Union High School District contracted with the Appellee to receive federal monies, and agreed to comply with all regulations within its power. The School District does not have the power to go beyond state statute, and thus, is not asserting a privilege which it can waive. Since A.R.S. § 38-431.03 was in effect at the time the School District contracted with the government for the funds, the government is deemed to be aware of the limitations imposed on the School District by Arizona state law.

LIST OF PARTIES

The following persons were parties to the proceeding in the United States Court of Appeals for the Ninth Circuit, whose judgment is sought to be reviewed: The United States of America, Phoenix Union High School District, Patrick Henderson, Mary K. Carr, V. A. Dunham, Jr., Georgie Goode, Don Kennedy, and Mary Price.

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IN THE

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

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PHOENIX UNION HIGH SCHOOL DISTRICT; PATRICK HENDERSON; MARY K. CARR; V. A. DUNHAM, JR.; GEORGIE GOODE; DON KENNEDY and MARY PRICE,
Defendants-Appellants.

JURISDICTIONAL STATEMENT

OFFICIAL AND UNOFFICIAL REPORTS

The decision of the United States Court of Appeals for the Ninth Circuit is reported as *United States v. Phoenix Union High School District*, 681 F.2d 1235 (9th Cir. 1982).

GROUNDS OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit is appealed to this Court pursuant to 28 U.S.C. § 1254(2). This appeal is based on the fact that the Court of Appeals held Arizona Statute § 38-431.03(B) invalid as repugnant to the laws of the United States. The Judgment of the Court of Appeals for the Ninth Circuit was entered on July 23, 1982. Appellants'

Petition for Rehearing was denied on August 30, 1982. Notice of Appeal was filed on October 7, 1982, and the Amended Notice of Appeal was filed on November 10, 1982, in the United States Court of Appeals for the Ninth Circuit.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Constitution of United States:

ARTICLE VI, Clause 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT X

> The powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people.

Federal Statutes, Subchapter V—Federally Assisted Programs, 28 U.S.C. § 2000d:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
> Pub.L. 88-352, Title VI, § 601, July 2, 1064, 78 Stat. 252.

Federal Regulations, 45 C.F.R. § 80.6(c):

> Each recipient shall permit access by the responsible department official or his designee during

normal business hours to such of his books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what effort it has made to obtain the information. Asserted consideration of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

Arizona Revised Statutes:

A.R.S. § 38-431.03 [prior to amendment].

B. Minutes of executive sessions shall be kept confidential except from members of the governing body which met in executive sessions.

A.R.S. § 38-431.03(B). [as amended, Laws 1982, 2nd Sess. Ch. 278]

B. Minutes of or discussions made at executive sessions shall be kept confidential except from members of the public body which met in executive session and from officers, appointees or employees who are the subject of discussion or consideration pursuant to Subsection A, Paragraph 1. The public body shall instruct persons who are present at the executive session regarding the confidentiality requirements of this article.
§ 38-431.07(C) [added, Laws 1982, 2nd Sess. Ch. 278]

In any action brought pursuant to this section challenging the validity of an executive session, the court may review in camera the minutes of such

executive session, and if the court in its discretion determines that such minutes are relevant and that justice so demands, the court may disclose to the parties or admit in evidence part of all of such minutes.

STATEMENT OF THE CASE

The Phoenix Union High School District receives federal funds from the Department of Education. As a condition of receipt of these funds, the School District agreed to comply with Title VI of the Civil Rights Act and the regulations promulgated pursuant thereto. The Office For Civil Rights, delegated the task of ascertaining compliance with Title VI, is conducting a compliance review of Phoenix Union High School District.

As part of its compliance review, the Office For Civil Rights requested access to the minutes of all executive session meetings of the Phoenix Union High School District's Governing Board. The School District denied this request in reliance on A.R.S. § 38-431.03(B), which prohibited the disclosure of executive session minutes.

On April 13, 1981, the United States, Appellee herein, filed a Complaint in the United States District Court for the District of Arizona seeking an injunction compelling disclosure by the School District of the minutes of all its executive session meetings of the Phoenix Union High School District's Governing Board.

On May 2, 1981, Plaintiff-Appellee moved for summary judgment. At that time, the questions sought to be reviewed by this Court were raised in the District Court. On July 14, 1981, the District Court entered its Order granting Plaintiff's Motion for Summary Judgment. The School District appealed that decision to the United States Court of Appeals for the Ninth Circuit, and the District Court's decision was affirmed on July 23, 1982. Defendants-Appellants' Petition for Rehearing

was denied by the United States Court of Appeals for the Ninth Circuit by its Order filed August 30, 1982. On September 13, 1982, the Court of Appeals issued its mandate.

On October 7, 1982, Defendants-Appellants filed a Notice of Appeal to this Court in the United States Court of Appeals for the Ninth Circuit, and an Amended Notice of Appeal was filed on November 10, 1982.

SUBSTANTIAL QUESTIONS ARE PRESENTED

The questions presented to this Court are so substantial that they require plenary consideration. The primary issue before the Court is the validity of a state statute. The decisions of the lower courts in this case invalidate the application of the Arizona statute, and erodes the state's police power. The rulings in this case involve the application of the supremacy clause and the principles of preemption. As the Supreme Court has repeatedly stated when a state's exercise of its police powers is challenged under the supremacy clause, we start with the assumption that the historic police powers of the states were not meant to be superseded by federal law unless that was the clear and manifest purpose of Congress. *E.g., Ray v. Atlantic Richfield Company*, 435 U.S. 151, 157 (1978).

Police power, which would be valid if not superseded by federal action, is superseded only where the repugnance to federal law is so direct and positive that the two acts cannot possibly be reconciled. *Kelly v. Washington*, 301 U.S. 1, 10 (1937). In the current case, the relevant state and federal laws can be reconciled; thus, the State's police power should be given proper deference.

The Court of Appeals for the Ninth Circuit found that Arizona Revised Statute § 38-431.03(B) is preempted by the provisions of a federal regulation, 45 C.F.R. § 80.6 (c), promulgated pursuant to Title VI of the Civil Rights Act of 1964. The specific and plain language of the state

statute and the federal regulation does not require this interpretation. Consequently, Appellant contends that the lower courts have misapplied the law of preemption.

The Arizona statute in question is part of Arizona's Open Meeting Law, A.R.S. § 38-431 *et. seq.*, which requires public meetings for public bodies, but also allows for confidential executive sessions of those bodies for certain enumerated purposes. A.R.S. § 38-431 *et. seq.* § 38-431.03(B) now provides:

> Minutes of or discussions made at executive sessions shall be kept confidential except from members of the public body which met in executive sessions, and from officers, appointees or employees who are the subject of discussion or consideration pursuant to subsection A, Paragraph 1. The public body shall instruct persons who are present at the executive session regarding the confidentiality requirements of this article.

A.R.S. § 38-431.03(B). By use of the word "shall" the Arizona Legislature clearly has mandated that minutes of executive sessions are to remain confidential.

A.R.S. § 38-431.03 was amended, as set forth above, effective July 24, 1982, and does not appear to have been considered in its amended form by the Court of Appeals. Prior to July 24, 1982, A.R.S. § 38-431.03(B) provided simply:

> Minutes of executive sessions shall be kept confidential except from members of the governing body which met in executive session.

The Court of Appeals for the Ninth Circuit ruled that the unamended A.R.S. § 38-431.03(B) was preempted to the extent that it conflicted with federal regulation 45 C.F.R. § 80.6(c) which provided that recipients of federal funds were to permit access to its records by the Office of Civil Rights so that the Office of Civil Rights

might ascertain the recipient's status of compliance with Title VI. The specific regulation provides as follows:

> Each recipient shall permit access by the responsible department official or his designee during normal business hours to such of his books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what effort it has made to obtain the information. Asserted considerations of privacy or confidentiality *may* not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law. [Emphasis supplied.]

45 C.F.R. § 80.6(c.)

The language of this regulation, "*may* not operate to bar the Department . . ." has been interpreted by the Court of Appeals to constitute a mandate. This interpretation changes the clear language of the regulation which uses "may" rather than "shall", and turns what appears to be a conditional statement into an absolute mandate. By construing the regulation this way, the Court of Appeals concluded that there was a direct conflict between the federal regulation and the state statute, requiring a declaration that the state statute is preempted.

This interpretation of the federal regulation flies in the face of established law requiring that statutes only be preempted when it is a "physical impossibility" to find compliance with both state and federal law. *Ray v. Atlantic Richfield Company*, 435 U.S. 151, 158 (1978).

Arizona Statute, § 38-431.03 is an exercise of the State's police power applying to all its public bodies. The Court of Appeals found that the statute should not be construed as an absolute bar to access of executive minutes, but should be construed to allow a balancing of competing interests. Appellants contend that A.R.S. § 38-431.03 as amended reveals the intent of the legislators to create an absolute bar, except under the circumstances specifically enumerated.

Since Section 38-431.03 applies to all public bodies in the State of Arizona, its interpretation is of utmost importance to the State. The Court of Appeals made its interpretation of A.R.S. § 38-431.03 before it was amended. Appellants filed a Petition for a Rehearing on the basis that the amendment revealed the Arizona legislature's intent to maintain the confidentiality of executive session minutes. Appellant's Petition was denied on August 30, 1982. Since that time, the Arizona Supreme Court has ruled on the interpretation of A.R.S. § 38-431.03(B), as amended. The Arizona Supreme Court held that executive session minutes of the Pima County Board of Supervisors could not be released to the Arizona Auditor General for purposes of its review despite a statute which required that the county make exhibits available to the auditor general. *Pima County v. Heinfeld*, No. 16223-SA, filed Nov. 12, 1982, —— Ariz. —— (1982). The Supreme Court must have the opportunity to review in a plenary fashion the application and interpretation of A.R.S. § 38-431.03.

Review in a plenary fashion is also essential to address the last related issue presented by this appeal. Title VI is of the genre referred to as "carrot and stick" legislation. Phoenix Union High School District, wishing to receive federal funds, "the carrot," must abide by the statute and its regulations. This type of legislation is well established. The case before the Court, however, presents the unusual situation where the Court of Appeals affirm-

ing the District Court has declared that a state statute is preempted as a result of the conditional receipt of funds.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 81-5602

DC No. CV 81-393 PHX VAC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PHOENIX UNION HIGH SCHOOL DISTRICT; PATRICK HENDERSON; MARY K. CARR; V. A. DUNHAM, JR.; GEORGIE GOODE; DON KENNEDY; and MARY PRICE,
Defendants-Appellants.

[Filed Jul. 23, 1982]

Appeal from the United States District Court
for the District of Arizona
Valdemar A. Cordova, District Judge, Presiding
Argued and submitted February 10, 1982

OPINION

Before: FARRIS, FERGUSON and NELSON, Circuit Judges.

FARRIS, Circuit Judge:

The Phoenix Union High School District appeals an order of summary judgment entered in favor of the United States. The United States Department of Education Office for Civil Rights sought certain minutes from the School District Governing Board's executive session

meetings as part of its investigation to determine whether the School District was complying with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* (1976 & Supp. III 1979), which prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. The investigation focused on the School District's policies and practices of assigning students to and within its schools.

Following several unsuccessful efforts at voluntary compliance with its request to inspect the school district's minutes, the Department of Education brought this action to compel disclosure.

The district court granted summary judgment for the United States and ordered the School District to permit access to minutes after January 4, 1961 that were relevant and not protected by the attorney-client privilege. The court prohibited the Department of Education from disclosing the content of the documents without further court order, and agreed to resolve all disputes concerning relevance or privilege.

The School District appealed.

The School District argues that it is absolutely barred from disclosing the minutes by Ariz. Rev. Stat. Ann. § 38-431.03(B) (1974 & Supp. 1981), which provides, "Minutes of executive sessions shall be kept confidential except from members of the public body which met in executive session."

The Arizona Court of Appeals applied a balancing test to determine whether a similar state statutory privilege prevented disclosure of confidential information in *Hanson v. Rowe*, 18 Ariz. App. 131, 134, 500 P.2d 916, 919 (1972). It relied on *Carr v. Monroe Manufacturing Co.*, 431 F.2d 384, 388 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971), which held that the granting or withholding of any privilege requires a balancing of competing policies. Under these circumstances, the generally worded

privilege here is construed to prohibit voluntary public disclosure and not disclosure pursuant to a legitimate legal inquiry. *See, e.g., Hanson*, 18 Ariz. App. at 134, 500 P.2d at 919. *See also United States v. Nixon*, 418 U.S. 683, 711-13 (1974).

The Department of Education argues that the School District is contractually obligated to permit inspection of the requested minutes. It points out that the School District, as a recipient of federal financial assistance, was required to sign an assurance of compliance contract wherein it agreed to "comply with title VI . . . and all requirements imposed by or pursuant to the Regulation of the Department. . . ." The implementing regulations include 34 C.F.R. § 100.6(c),[1] which provides:

> Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. . . . Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

The Department of Education contends that this section places a clear responsibility on the School District to cooperate with the Department of Education's investigation to determine whether the School District is complying with the requirements of Title VI. We agree.[2] In a

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[1] Formerly 45 C.F.R. § 80, *et seq.*

[2] Because these regulations are clear and unambiguous and the School District's acceptance of them was knowing and voluntary, there is no question of constitutional infirmity under *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

similar dispute contesting access by the Department of Health, Education, and Welfare to various college records, we relied on the assurance of compliance contract in requiring the college to furnish the information sought. *United States v. El Camino Community College District*, 600 F.2d 1258, 1260 (9th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). *See also Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (The "school district contractually agreed to 'comply with title VI . . . and all requirements imposed by or pursuant to the Regulation' of HEW (45 CFR pt. 80) which are 'issued pursuant to that title . . .' "); *Soria v. Oxnard School District Board of Trustees*, 386 F. Supp. 539, 545 (C.D. Cal. 1974).

The contractual assurance of compliance is not without limits. It must be applied with an eye toward striking a proper accommodation between the federal interest in ascertaining compliance with Title VI and the state's legitimate countervailing interests. Section 100.6(c) permits access only to information "as may be pertinent to ascertain compliance." 34 C.F.R. § 100.6(c). The section provides that "considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance. . . ." The district court permitted access to confidential minutes of executive session meetings from 1961 to the present which were relevant to the Department's investigation and not protected by the attorney-client privilege. The court properly weighed the competing interests in fashioning an appropriate protective order. We find no error in the order.

Further, the state statute is preempted to the extent it frustrates the congressionally mandated duty to investigate whether public programs receiving federal funds are complying with Title VI.[3]

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[3] The Department of Education's Office for Civil Rights is required by 34 C.F.R. § 100.7(a) to determine periodically whether recipients are complying with Title VI and its implementing regulations.

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . . ," or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978) (citations omitted).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV-81-393-PHX-VAC

UNITED STATES OF AMERICA,
Plaintiff,

v.

PHOENIX UNION HIGH SCHOOL DISTRICT, *et al.*,
Defendants.

[Filed Jul. 15, 1981]

ORDER

Plaintiff's Motion for Summary Judgment and Motion to Quash Subpoena Duces Tecum and for Order Prohibiting Taking of Deposition having come on regularly for hearing before the Court July 6, 1981, and the Court having been presented with memoranda by both counsel, having had an opportunity to read the same, having heard the arguments of counsel and being fully advised on the premises,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment is granted to the extent that Defendants will be required to permit Plaintiff access to Defendants' executive session minutes beginning January 4, 1961, and furnish copies which are relevant to Plaintiff's investigation of the Phoenix Union High School District to determine its compliance status with Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, et seq.

2. The access which Defendants are to provide Plaintiff will commence on August 3, 1981, and shall continue

thereafter during Defendants' normal business hours at Defendants' District office located at 2526 West Osborn Road, Phoenix, Arizona, or at such other place and at such other times to which the parties may otherwise agree, until Plaintiff's review of those materials is completed.

3. Prior to Defendants permitting access by Plaintiff to its executive session minutes, Defendants may review those executive session minutes commencing January 4, 1961, to the present to determine which portions of them, if any, may be privileged as communications between attorney and client, and which of them, if any, may not be relevant to the Plaintiff's investigation above described. Defendants shall provide Plaintiff, on or before July 27, 1981, with copies of all available agenda for executive session meetings. For any minutes or portions of minutes which are deemed to be privileged or irrelevant by Defendants, Defendants shall prepare and provide to Plaintiff, on or before August 3, 1981, a listing of those minutes or portions of minutes which will include the following information:

A. Date of the meeting;

B. Persons present at the meeting;

C. The subject matter discussed at the meeting or portion of the meeting which is deemed to be privileged or irrelevant; and

D. Defendants' description of the minutes as being either privileged or irrelevant, or both.

4. Should there be any disagreement between the parties with respect to withholding by Defendants of any executive session minutes based upon assertions of attorney-client privilege or irrelevance to Plaintiff's investigation, those matters may be brought before the court for a determination . . . . as to whether or not the assertions of privilege and irrelevance are appropriate.

5. No material to which Plaintiff is permitted access pursuant to this Order shall be disclosed by Plaintiff or its agents or employees to any person or entity not an investigator or lawyer employed by the United States of America in either its Department of Justice or Department of Education, Office for Civil Rights, without prior application to and order of this Court, permitting the parties hereto an opportunity to advise the court with respect to their respective positions concerning such disclosure. Should any inquiry be made to Plaintiff, its agents or employees, in the nature of a request for disclosure of such information, a copy of this Order shall be provided to any such person or entity making such inquiry, and no further disclosure of any kind shall be made to such inquiring person or entity without further order of this court.

6. Plaintiff's Motion to Quash and for Order Prohibiting Taking of Deposition, based upon the foregoing determinations and orders, is granted.

DONE this 14th day of July, 1981.

/s/ Valdemar A. Cordova
VALDEMAR A. CORDOVA
Judge of the Federal Court
for the District of Arizona

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5602

DC CV 81-393 VAC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.

PHOENIX UNION HIGH SCHOOL DISTRICT; PATRICK HENDERSON; MARY K. CARR; V. A. DUNHAM, JR.; GEORGIE GOODE; DON KENNEDY; and MARY PRICE,
Defendants-Appellants.

[Filed Sep. 13, 1982]

Appeal from the United States District Court
for the District of Arizona (Phoenix)

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY
ATTEST Sep. 7, 1982
PHILLIP B. WINBERRY
Clerk of Court

by: /s/ Oscar Tagle
OSCAR TAGLE
Deputy Clerk

Filed and entered July 23, 1982

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-5602

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PHOENIX UNION HIGH SCHOOL DISTRICT; PATRICK HENDERSON; MARY K. CARR; V. A. DUNHAM, JR.; GEORGIE GOODE; DON KENNEDY and MARY PRICE,
Defendants-Appellants.

[Filed Aug. 30, 1982]

ORDER

Before: FARRIS, FERGUSON, and NELSON, Circuit Judges.

Appellant's petition for rehearing is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 81-5602

DC No. CIV-81-393-PXH-VAC

UNITED STATES OF AMERICA,
Appellee,

vs.

PHOENIX UNION HIGH SCHOOL DISTRICT, *et al.*,
Appellants.

[Filed Oct. 7, 1982]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Appellants, PHOENIX UNION HIGH SCHOOL DISTRICT, PATRICK HENDERSON, MARY K. CARR, V. A. DUNHAM, JR., GEORGIE GOODE, DON KENNEDY, and MARY PRICE, hereby appeal to the United States Supreme Court from this Court's Judgment of July 23, 1982, affirming the judgment of the United States District Court for the District of Arizona, granting Appellee's Motion for Summary Judgment.

DATED this 5 day of October, 1982.

DECONCINI MCDONALD BRAMMER
YETWIN & LACY, P.C.

By /s/ J. Wm. Brammer, Jr.
J. WM. BRAMMER, JR.
240 North Stone Avenue
Tucson, Arizona 85701
Attorneys for Appellants

Copy of the foregoing
mailed this 5 day of
October, 1982, to:

The Honorable Valdemar A. Cordova
United States District Court Judge
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 81-5602

DC No. CIV-81-393-PHX-VAC

UNITED STATES OF AMERICA,
Appellee,

vs.

PHOENIX UNION HIGH SCHOOL DISTRICT, *et al.*,
Appellants.

[Filed Nov. 20, 1980]

AMENDED NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Appellants, PHOENIX UNION HIGH SCHOOL DISTRICT, PATRICK HENDERSON, MARY K. CARR, V. A. DUNHAM, JR., GEORGIE GOODE, DON KENNEDY, and MARY PRICE, hereby appeal to the United States Supreme Court from this Court's Judgment of July 23, 1982, affirming the Judgment of the United States District Court for the District of Arizona, granting Appellee's Motion for Summary Judgment.

This appeal is taken pursuant to 11 U.S.C. § 1254(2).

DATED this 8th day of November, 1982.

DECONCINI MCDONALD BRAMMER
YETWIN & LACY, P.C.

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Supreme Court, U.S.
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No. 82-891

In the Supreme Court of the United States

OCTOBER TERM, 1982

PHOENIX UNION HIGH SCHOOL DISTRICT, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination in federally assisted programs, preempts application of a state law that would withhold from federal investigators information relevant to a Title VI investigation.

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MOTION TO DISMISS OR AFFIRM

The Solicitor General, on behalf of the United States, moves, pursuant to Sup. Ct. R. 16(1), that the appeal be dismissed or that the judgment of the court of appeals in this case be affirmed.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-5a) is reported at 681 F. 2d 1235. The order of the district court (J.S. App. 6a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals (J.S. App. 9a) was entered on July 23, 1982. A petition for rehearing was denied on August 30, 1982 (Pet. App. 10a). A notice of appeal was filed on October 7, 1982 (Pet. App. 11a-12a), and an amended notice of appeal was filed on November 8, 1982. The jurisdiction of this Court is invoked under 28

U.S.C. 1254(2), but there is a jurisdictional question. A decision holding application of a state law preempted by federal law comes within this Court's appellate jurisdiction. See *Tully* v. *Mobil Oil Corp.*, No. 81-96 (Feb. 22, 1982).

STATEMENT

1. In 1980, the United States Department of Education was investigating the Phoenix Union High School District to determine whether the school district was complying with Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Title VI prohibits recipients of federal financial assistance from discriminating on the basis of race, color, or national origin in any federally assisted program or activity.

During the course of the investigation, investigators determined that minutes of the school board's executive sessions might contain relevant material and asked to see the minutes (J.S. App. 1a-2a). The school superintendent refused to turn over the minutes, stating that they were confidential under Ariz. Rev. Stat. Ann. § 38-431.03(B) (1982 Supp.), which provides: "Minutes of executive sessions shall be kept confidential except from members of the governing body which met in executive session" (J.S. App. 2a).

After negotiations to obtain the minutes failed, the Department of Education, pursuant to 34 C.F.R. 100.8(a), referred the dispute to the Department of Justice. On April 13, 1981, the government filed suit, alleging that the school district's refusal to permit investigators access to the minutes violated Title VI, applicable federal regulations, and contractual assurances the district made upon receiving federal financial assistance. The government asked the court to direct the district to allow access to the records, and the government later moved for summary judgment (J.S. App. 2a).

2. On July 15, 1981, the district court granted summary judgment in favor of the government (J.S. App. 6a-8a) and ordered the school board to permit the government to see and copy relevant minutes. The court permitted the school district, prior to turning over the records, to remove those entries not relevant to the investigation or protected under the attorney-client privilege (*id.* at 7a). The court also prohibited the government from releasing the records to anyone outside the Justice Department or the Office of Civil Rights of the Department of Education without the district court's approval. The district court subsequently stayed its order pending appeal.

The court of appeals affirmed (J.S. App. 1a-5a). The court stated that, under Arizona law, the privilege was not absolute, but rather could be breached where the interests of disclosure, such as furtherance of a legal inquiry, outweighed those of confidentiality (*id.* at 2a-3a). The court then explained that the school district, when it accepted federal funds, had signed an assurance of compliance stating that the district would comply with Title VI regulations. One of these regulations, 34 C.F.R. 100.6(c), states that assertions of confidentiality may not bar the government's access to relevant material. Accordingly, the court of appeals held, the school district as part of the assurance of compliance had agreed to permit the government access to confidential material (J.S. App. 3a-4a). The court also held that, to the extent the state statute frustrates the Title VI investigation, it is preempted by Title VI (*id.* at 4a-5a).

3. On remand, the district court ordered the school district to comply with its original order. On December 29, 1982, the government received from the school district the executive session minutes that the district had been withholding pursuant to the state confidentiality statute.

DISCUSSION

1. At the outset, we note that the school district's recent delivery of executive session minutes does not moot this case. The district court's injunction requires the school district to deliver to the government copies of executive session minutes from January 4, 1961. The injunction is open-ended; there is no date on which the duty to release relevant minutes ceases (see J.S. App. 5a-6a). Accordingly, the injunction applies by its terms to future meetings. Since there is no indication in the record that the school district will no longer hold executive sessions, the injunction covers future school district activity, and therefore the controversy remains live. See, e.g., *NLRB* v. *Raytheon Co.*, 398 U.S. 25 (1970).

A holding that this case is moot would allow appellants, who by filing their jurisdictional statement have indicated that they do not acquiesce in the judgment below, to return to their policy of denying the government access to executive session minutes that are needed for a Title VI investigation. When holding a case moot, this Court's practice is to vacate the lower court judgment and direct the court to dismiss the complaint. *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 94 (1979); *United States* v. *Munsingwear*, 340 U.S. 36, 39-41 (1950).[1] This resolution would free appellants to return in the future to their preferred practice of denying access, despite the holdings below that the district's practice is contrary to federal law and the possibility of similar future conduct. See *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 288-289 (1982); *NLRB* v. *Raytheon Co.*, *supra*, 398 U.S. at 28. Accordingly, this case is not moot.

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[1]This is also the proper disposition when a case is pending on appeal even though probable jurisdiction has not been noted. See Reply Memorandum for the United States in *Donovan* v. *Blitz*, No. 82-611 (filed Jan. 4, 1982), a copy of which we are furnishing to counsel for appellants.

2. This case is not properly within the appellate jurisdiction of this Court. While the court of appeals did hold that the Arizona statute was preempted by Title VI, that was not the sole basis for its affirmance of the district court's disclosure order. The court apparently found that the Arizona statute itself did not prevent disclosure in the circumstances presented here (J.S. App. 2a-3a). Hence, even assuming that the appellants are correct in their contentions on the questions presented in the jurisdictional statement, they are not entitled to prevail unless the court of appeals' interpretation of Arizona law is reversed. It is unclear whether appellants have challenged that interpretation in their jurisdictional statement (see J.S. 5), but, in any event, the court of appeals' decision on that point does not fall within this Court's appellate jurisdiction under 28 U.S.C. 1254(2). Accordingly, the appeal should be dismissed. See R. Stern & E. Gressman, *Supreme Court Practice* 65-66 (5th ed. 1978); cf. *United States* v. *Hastings*, 296 U.S. 188, 193 (1935). Treating the appellants' papers as a petition for a writ of certiorari under 28 U.S.C. 2103, the petition should be denied because it fails to present an issue warranting review by this Court.

3. a. If the state law discussion in the decision below is not considered dispositive and the decision is considered as resting solely on the preemption holding, the decision is plainly correct and the judgment should be affirmed.

Appellants' primary contention (J.S. 5-8) is that Title VI and its regulations do not preempt the state law at issue here. This contention is without merit. It is well established that state law must yield when its enforcement " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). While appellants correctly state (J.S. 7) that a court should first try to reconcile

state and federal law before invalidating the state law, they are mistaken in their view that the conflicting laws involved can be reconciled in their application here.

In enacting Title VI Congress intended to prevent recipients of federal assistance from using such assistance in programs that are operated in a discriminatory manner. The Department of Education is charged under 42 U.S.C. 2000d-1 with the duty to effectuate Title VI and to investigate a recipient like the appellant school district in order to discover whether it is complying with Title VI. Enforcement of the state law here would deny the Department access to material that might disclose violations of Title VI; hence, its enforcement is an "obstacle" to the Department's efforts to enforce Title VI.[2] Since there is no way to reconcile the laws and still permit a complete Title VI investigation, the state law is preempted to the extent that it frustrates the investigation.

b. Appellants' further contention (J.S. 8-9) that, when signing the assurance of compliance, they could not agree to disclose these minutes to the government because they had no authority to agree to abrogate the state law is similarly without merit. Because the state law is preempted to the extent it conflicts with Title VI, it does not bar the government's access to these records. Thus, appellant school district's assurance of compliance was effective to establish an agreement to provide the government with all documents relevant to a proper Title VI investigation. See, e.g., *United States* v. *El Camino Community College District*, 600 F. 2d 1258 (9th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). Cf. *Lau* v. *Nichols*, 414 U.S. 563, 568, 569 (1974).

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[2]There is no basis for appellants' suggestion (J.S. 7) that the applicable federal regulation, 34 C.F.R. 100.6(c), elevates state law over federal law and authorizes denying the government access to the minutes.

CONCLUSION

The appeal should be dismissed. Treating the papers as a petition for a writ of certiorari, the petition should be denied. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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